

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Implementation of Section 255 of the)
Telecommunications Act of 1996)

WT Docket No. 96-198

Access to Telecommunications Services,)
Telecommunications Equipment, and)
Customer Premises Equipment)
by Persons with Disabilities)

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OFFICE OF SECRETARY

**COMMENTS OF THE
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION**

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TABLE OF CONTENTS

SUMMARY OF POSITION	ii
I. INTRODUCTION	2
A. Identification and Interest of CEMA	2
B. Summary of Position	2
II. SECTION 255 APPLIES ONLY TO EQUIPMENT THAT IS USED PRIMARILY FOR TELECOMMUNICATIONS	4
III. SECTION 255 AFFORDS EQUIPMENT MANUFACTURERS THE FLEXIBILITY TO PROVIDE ACCESSIBLE EQUIPMENT IN THE MOST COST-EFFECTIVE MANNER	9
IV. THE COST OF MODIFYING EQUIPMENT AND THE FINANCIAL RESOURCES OF THE MANUFACTURER SHOULD BE PRIMARY FACTORS IN DETERMINING WHAT IS "READILY ACHIEVABLE" UNDER SECTION 255	10
V. THE COMMISSION'S INVOLVEMENT SHOULD BE LIMITED TO HELPING THE ACCESS BOARD TO DEVELOP VOLUNTARY, PROSPECTIVE GUIDELINES; ADDITIONAL FCC REGULATIONS WOULD BE COUNTERPRODUCTIVE	13
VI. COMMISSION ENFORCEMENT OF SECTION 255 VIOLATIONS BY EQUIPMENT MANUFACTURERS SHOULD BE LIMITED TO DECLARATORY RULINGS	16
VII. CONCLUSION	18

SUMMARY OF POSITION

CEMA believes that the Access Board's formulation of voluntary guidelines is sufficient to promote accessible CPE. No specific rulemaking authority has been granted to the Commission in Section 255. Additional FCC guidelines would be unnecessary and could be interpreted as inconsistent with the Access Board's guidelines. The Access Board's guidelines should be voluntary in nature and take a procedural (*e.g.*, consultations during the design process with organizations for the disabled), not prescriptive (*e.g.*, technical standards), approach. Following such guidelines should provide manufacturers with a "safe harbor" defense against any enforcement action brought under Section 255.

Equipment manufacturers should *not* be required to make each and every individual product accessible to people with every disability. It would be technically impossible to comply with such a requirement in many instances and would, in general, cause manufacturing inefficiencies that unnecessarily raise prices for the general public. Equipment manufacturers should be afforded the flexibility to provide accessible equipment in the most cost-effective manner, whether by (1) integrating such features into mass-market equipment, or (2) producing specialized equipment specifically designed for persons with disabilities (stand-alone equipment or peripheral "add-on" components to standard equipment).

The scope of Section 255 is limited to equipment used *primarily* for telecommunications services; equipment that is used only tangentially in combination with telecommunications services should *not* be made subject to the requirements of Section 255. An overly expansive reading of the Congressional purpose in, and Commission authority under, Section 255 would embroil the Commission in a myriad of complex, fact-specific controversies

that would be ignited if certain interests are encouraged to seek government intervention in virtually the entire consumer electronics manufacturing sector. It is incumbent upon the Commission not to broaden the scope of Section 255 beyond Congress' intent nor to introduce a regulatory regime into areas where the Commission lacks both expertise and jurisdiction (*e.g.*, data processing, computer manufacturing.)

The definition of "readily achievable" should take into account the cost of modifying equipment, as well as a manufacturer's financial resources. Moreover, prior to initial compliance, and once a manufacturer has complied with accessible guidelines for a piece of equipment, the manufacturer should be afforded a grace period equal in length to the production cycle of that equipment before having to comply with any new or revised guidelines.

Alleged violations of Section 255 by equipment manufacturers should be subject to the Commission's declaratory ruling procedures; Section 208's damage remedy applies only to common carriers. In cases where equipment is manufactured by different companies, an injunction should apply only to the manufacturer responsible for the specific component in violation; assemblers and distributors should be exempt from all accessible requirements and all injunctions. Service providers should work with equipment manufacturers to promote accessibility and failure of service providers to cooperate should be a defense available to manufacturers in any enforcement process.

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CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION**

The Consumer Electronics Manufacturers Association ("CEMA") hereby submits the following comments in response to the Notice of Inquiry ("*Notice*") which the Commission issued in the above-captioned proceeding on September 19, 1996.¹ In the *Notice*, the Commission has inquired how best to implement Congress' directives regarding access to telecommunications services and customer premises equipment ("CPE") by persons with disabilities, as set forth in new Section 255 of the Communications Act.²

As set forth more fully below, CEMA strongly supports the production of telecommunications equipment and CPE that is accessible to, and usable by, persons with

¹ *Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, Notice of Inquiry, WT Docket No. 96-198, FCC 96-382 (released Sep. 19, 1996) [hereinafter "*Notice*"].

² New Section 255 was added to the Communications Act by Section 101 of the Telecommunications Act of 1996. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) [hereinafter "1996 Act"].

disabilities. Such accessible equipment, however, should be made available in such a way that does not unnecessarily retard technological innovation or increase the prices paid by the general public for mass-market equipment. Most importantly, equipment manufacturers should be afforded the flexibility to provide accessible equipment in the most cost-effective manner. Such flexibility requires that the Architectural and Transportation Barriers Compliance Board ("Access Board") establish guidelines *only* (*i.e.*, no mandatory standards).

I. INTRODUCTION

A. Identification and Interest of CEMA

CEMA is the principal trade association of the U.S. consumer electronics industry. CEMA's members design, manufacture, import, distribute and sell a wide variety of consumer electronics equipment, including cordless telephones, personal computers, answering machines, television receivers, cable set-top boxes, VCRs, camcorders, audio equipment, and in-home network wiring and equipment. As an association of companies that manufacture consumer electronics equipment that can be used with telecommunications services, CEMA has an interest in ensuring that *both* mass-market consumers *and* persons with disabilities have quality equipment available at affordable prices.

B. Summary of Position

CEMA believes that the Access Board's formulation of voluntary guidelines is sufficient to promote accessible CPE. No specific rulemaking authority has been granted to the Commission in Section 255. Additional FCC guidelines would be unnecessary and could be interpreted as inconsistent with the Access Board's guidelines. The Access Board's guidelines should be voluntary in nature and take a procedural (*e.g.*, consultations during the design process

with organizations for the disabled), not prescriptive (*e.g.*, technical standards), approach. Following such guidelines should provide manufacturers with a "safe harbor" defense against any enforcement action brought under Section 255.

Equipment manufacturers should *not* be required to make each and every individual product accessible to people with every disability. It would be technically impossible to comply with such a requirement in many instances and would, in general, cause manufacturing inefficiencies that unnecessarily raise prices for the general public. Equipment manufacturers should be afforded the flexibility to provide accessible equipment in the most cost-effective manner, whether by (1) integrating such features into mass-market equipment, or (2) producing specialized equipment specifically designed for persons with disabilities (stand-alone equipment or peripheral "add-on" components to standard equipment).

The scope of Section 255 is limited to equipment used *primarily* for telecommunications services; equipment that is used only tangentially in combination with telecommunications services should *not* be made subject to the requirements of Section 255. The definition of "readily achievable" should take into account the cost of modifying equipment, as well as a manufacturer's financial resources. Moreover, prior to initial compliance, and once a manufacturer has complied with accessible guidelines for a piece of equipment, the manufacturer should be afforded a grace period equal in length to the production cycle of that equipment before having to comply with any new or revised guidelines.

Alleged violations of Section 255 by equipment manufacturers should be subject to the Commission's declaratory ruling procedures; Section 208's damage remedy applies only to common carriers. In cases where equipment is manufactured by different companies, an

injunction should apply only to the manufacturer responsible for the specific component in violation. Service providers should work with equipment manufacturers to promote accessibility and failure of service providers to cooperate should be a defense available to manufacturers in any enforcement process.

II. SECTION 255 APPLIES ONLY TO EQUIPMENT THAT IS USED PRIMARILY FOR TELECOMMUNICATIONS

In the *Notice*, the Commission seeks comment on whether the Section 255 accessibility requirements apply to equipment that can be used both with telecommunications services and with other, non-telecommunications services.³ CEMA strongly believes that the scope of Section 255 is limited to equipment used *primarily* for telecommunications services; equipment that is used only tangentially in combination with telecommunications services should *not* be made subject to the requirements of Section 255. The scope of Section 255 is admittedly very broad, but Congress has circumscribed this provision through its choice of language to effect access by persons with disabilities to *telecommunications*. It is incumbent upon the Commission not to broaden the scope of Section 255 beyond Congress' intent nor to introduce a regulatory regime into areas where the Commission lacks both expertise and jurisdiction (*e.g.*, data processing, computer manufacturing.) Such an expansion of Commission authority would be legally ill-founded and would not, in the long term, serve the interests of persons with disabilities. Voluntary industry guidelines, which can adapt rapidly to changing technologies to meet the needs of persons with disabilities, offer a more effective and legally supportable path

³ *Notice* at ¶ 9.

toward fulfilling the Congressional purpose of access for persons with disabilities. An overly expansive reading of the Congressional purpose in, and Commission authority under, Section 255, by contrast, would embroil the Commission in a myriad of complex, fact-specific controversies that would be ignited if certain interests are encouraged to seek government intervention, on a massive scale, in virtually the entire consumer electronics manufacturing sector.

The Senate Committee Report emphasized "the importance of access to *communications* for all Americans" and that the purpose of Section 255 was to "permit more ready accessibility of *communications* technologies by individuals with disabilities."⁴ Given the focus on communications, only equipment that is primarily used for communications is properly subject to the accessibility requirements of Section 255. The Congress did not intend to interfere in the normal free-market processes and decisionmaking of industries distinct from telecommunications.

Equipment that is used only to access information services is clearly outside of the 1996 Act's definition of CPE. Section 153(14) of the Communications Act defines CPE as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate *telecommunications*."⁵ Section 153(43) defines "telecommunications" as:

⁴ S. Rep. No. 23, 104th Cong., 1st Sess., at 52 (1995) (emphasis added).

⁵ 47 U.S.C. § 153(14) (emphasis added).

the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.⁶

In adopting this language, the Congress accepted the Senate's definition of "telecommunications."⁷ The report accompanying the Senate bill unambiguously explains that the Senate's definition of "telecommunications":

*excludes those services, such as interactive games or shopping services and other services involving interaction with stored information, that are defined as information services.*⁸

That information services (or, in the Commission's prior parlance, enhanced services⁹) are not included within the definitions of "telecommunications" or "telecommunications service" is confirmed by the fact that the 1996 Act also contains a separate

⁶ 47 U.S.C. § 153(43). This definition is akin to the definition of basic service adopted by the Commission and affirmed by the courts. *See, e.g., Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 205 n.18 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) ("Basic [telecommunications] service is the offering of 'a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.'").

⁷ *See* H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., at 116 (1996) ("The House recedes to the Senate with amendments with respect to the definition[] of . . . 'telecommunications.'").

⁸ S. Rep. No. 23, 104th Cong., 1st Sess., at 17-18 (1995) (emphasis added).

⁹ *See, e.g., Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2633 (1988) ("The MFJ contains a restriction on BOC provision of 'information services,' a category that appears to be substantially equivalent to the Commission's regulatory category of 'enhanced services.'"); *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 24 n.60 (1988) ("The Modified Final Judgment . . . prohibited the BOCs from offering any 'information services,' a class of services that apparently is similar to enhanced services.").

definition of "information service."¹⁰ The plain language of the 1996 Act, together with the legislative history of the House and Senate bills, thus make clear that equipment used to access "information services" is *not* telecommunications CPE. Examples of equipment that is used exclusively to access information services include, but are not limited to: television sets; VCRs; computers without modems; and set-top boxes.¹¹

For equipment that is used primarily to access information services but also can be used tangentially for telecommunications services (*e.g.*, computers with modems; interactive cable set-top boxes), the Commission's "contamination theory" should govern. As the Commission stated in the context of value-added networks ("VANs"):

Under the "contamination theory" developed in the course of the Computer II regulatory regime, certain VANs are treated as unregulated enhanced service providers because they offer enhanced protocol processing services in conjunction with otherwise basic transmission services. The enhanced component of their offerings "contaminates" the basic component and the entire offering is treated as enhanced.¹²

The public policy behind the "contamination theory" is that a service that is primarily enhanced in nature should not become regulated simply because a small portion of the service is basic -- the marginal use should not control the regulatory destiny of the primary use. The same concept

¹⁰ 47 U.S.C. § 153(20). This definition is based on the House bill's definition of "information service," which is based "on the definition used in the Modification of Final Judgment." H.R. Rep. No. 204, 104th Cong., 1st Sess., at 125 (1995). See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., at 116 (1996).

¹¹ Accessibility to information services by the disabled may be a worthy public policy goal, but it is clearly outside of the scope of Section 255.

¹² *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Supplemental Notice of Proposed Rulemaking, 1986 FCC LEXIS 3236 at ¶ 43 n.52 (1986).

should be applied to equipment. If equipment is primarily used for non-telecommunications functions, such functions should contaminate the equipment so that it is excluded from Section 255 regulation.¹³

The Commission's decision in CC Docket No. 92-90 that a computer's fax modem board constitutes a "telephone facsimile machine" for purposes of the Telephone Consumer Protection Act of 1991 ("TCPA") is of no consequence for this proceeding.¹⁴ In the TCPA proceeding, the issue was the effect of the use of fax modem boards on the *recipients* of "junk faxes;" the Commission correctly concluded that the effect on recipients was identical regardless of whether a fax modem or stand-alone facsimile machine was used. In contrast, this proceeding involves *accessibility* by *users* to equipment. Users of stand-alone CPE utilize it for one, exclusive purpose: to originate telecommunications. In contrast, users of computers with modems utilize their computers for a multitude of purposes, the *vast majority* of these purposes being non-telecommunications related.¹⁵

¹³ Moreover, the telecommunications aspects of computer interaction with the telephone network are almost entirely subsumed within functions for access to information services (*e.g.*, access to on-line service providers and the Internet).

¹⁴ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12404-06 (1995).

¹⁵ It is important to note that many, if not most, computer modems in use today are internal modems that do not present a distinct interface to the user. Although the modem itself may be within the scope of Section 255, this fact should not, through any "reverse contamination" theory, result in other equipment that is *not* used primarily as telecommunications CPE (*e.g.*, computers) being designated as such.

III. SECTION 255 AFFORDS EQUIPMENT MANUFACTURERS THE FLEXIBILITY TO PROVIDE ACCESSIBLE EQUIPMENT IN THE MOST COST-EFFECTIVE MANNER

The Commission asks whether a manufacturer must ensure that *each* of its equipment offerings must be redesigned so as to be accessible to disabled persons or, in the alternative, whether Section 255 permits manufacturers to develop some products for the general public and some products for disabled persons.¹⁶ The goal of Section 255 is to provide disabled persons with telecommunications equipment and CPE that is accessible and usable. Section 255 wisely does not mandate the *means* by which this goal is accomplished. Congress' intent was clearly demonstrated in the House version of Section 255, which stated that "[s]uch regulations shall permit the use of *both* standard and special equipment"¹⁷ Manufacturers may determine that integrating accessible features into the standard equipment marketed to the general public is more expensive than producing specialized equipment for the portion of the population that is disabled.¹⁸ There is no valid public policy reason why manufacturers and consumers should be *required* to incur the costs of modifying all equipment when the modification is only required for an estimated 12-20 percent of the customers, at most.¹⁹ Provided that there are adequate retail outlets for specialized equipment, persons with disabilities

¹⁶ Notice at ¶ 22.

¹⁷ H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 14 (1995) (section 249(c)(1)).

¹⁸ Specialized equipment for the disabled could consist of either stand-alone equipment or peripheral "add-on" components to standard equipment.

¹⁹ A 1979 National Health Interview Survey reported approximately 30 million people in the United States (12-20% of the population) with disabilities. There is no clear estimate as to what portion of this population needs changes in equipment design for this equipment to be accessible to them.

will have the ability to purchase the equipment they need regardless of the accessibility of standard equipment.²⁰

IV. THE COST OF MODIFYING EQUIPMENT AND THE FINANCIAL RESOURCES OF THE MANUFACTURER SHOULD BE PRIMARY FACTORS IN DETERMINING WHAT IS "READILY ACHIEVABLE" UNDER SECTION 255

CEMA agrees with the Commission's tentative conclusion that the issue of cost is an important area of inquiry in establishing "readily achievable" accessibility standards.²¹ The definition of "readily achievable" in the ADA, which is incorporated by reference in Section 255²², is "easily accomplishable and able to be carried out without much difficulty *or expense*."²³ The costs associated with retooling an assembly line are prohibitively expensive if it is done before the production cycle lifespan of a product has been allowed to play itself out. Most production cycles in the consumer electronics industry last approximately three years.²⁴ This amount of time is needed in order to recoup the significant investment involved in designing a product, tooling an assembly line large enough to capture economies of scale, and marketing the product. The cost of modifying equipment is much lower if done at the initial design stage rather than in the middle of a production run. The Commission, therefore, should recommend

²⁰ Of course, manufacturers may determine that an integrated, adjustable product is more cost-effective than creating separate products to address the needs of various users.

²¹ Notice at ¶ 17.

²² 47 U.S.C. § 255(a)(2).

²³ 42 U.S.C. § 12181(9) (emphasis added).

²⁴ Model numbers produced on the assembly line may change on a more frequent basis, but such changes are minor and incremental in nature and do not require a retooling of the assembly line.

that any accessibility guidelines promulgated by the Access Board recognize the need of manufacturers to complete production runs prior to making design changes.

The Commission notes that the rapid pace of technological change may necessitate a continual updating of what types of accessibility modifications are "readily achievable." The Commission asks whether manufacturers should receive a grace period after having complied with the then-current accessibility guidelines before having to retool their assembly lines and update to any new guidelines.²⁵ CEMA urges the Commission to recommend that consumer electronics manufacturers receive a grace period equal to the length of a production cycle (*i.e.*, approximately three years). As discussed above, it is prohibitively expensive to retool an assembly line before the end of a production cycle. Just as initial compliance with accessibility guidelines should await the end of a production cycle, so should updated compliance requirements.

Not affording manufacturers a grace period would also have the detrimental effect of deterring technological innovation. A manufacturer might think twice before introducing a potentially valuable technical innovation that, by expanding what is "readily achievable," causes Section 255 compliance costs to skyrocket immediately.

The ADA definition of "readily achievable" also takes into account the "overall financial resources" of the entity in question (*e.g.*, manufacturers). The financial resources of a manufacturer in the consumer electronics industry is especially important because of the extremely high degree of competition faced by such manufacturers and their resulting razor-thin profit margins. The financial shock caused by a forced retooling in the middle of a production

²⁵ Notice at ¶ 16.

cycle could easily change a profitable consumer electronics company into one suffering losses and facing possible bankruptcy. The Commission asks whether the entire financial resources of a manufacturer's parent corporation and subsidiaries should be taken into account when determining whether an equipment modification is "readily achievable" by a manufacturer.²⁶ CEMA strongly answers NO. Parent corporations judge each of their subsidiaries as an individual profit center that must pay its own way. If the subsidiary is losing money, the parent will "pull the plug" and divert its investments into more profitable ventures. The Commission should not assume that a parent corporation will bail out a subsidiary that cannot turn a profit if it is required to comply with accessibility standards. Such an assumption will result in many consumer electronics manufacturers going out of business, resulting in less competition and higher prices for all consumers, including persons with disabilities.

The Commission also asks whether the concept of "readily achievable" should take into account multinational manufacturers subject to a multitude of different regulatory regimes.²⁷ It only makes sense that manufacturers facing additional regulatory compliance costs should have this taken into account. As the Commission itself notes, "design changes to accommodate one disability [may] make accommodation of other disabilities by the same offering more difficult." Similarly, equipment modifications necessitated by one country's regulations may greatly increase the cost of complying with another nation's accessibility standards. Given that cost is a major factor in determining what modifications are "readily

²⁶ Notice at ¶ 19.

²⁷ Notice at ¶ 20.

achievable," the extra costs associated with complying with many different nations' regulatory requirements must be taken into account.

**V. THE COMMISSION'S INVOLVEMENT
SHOULD BE LIMITED TO HELPING THE ACCESS BOARD
TO DEVELOP VOLUNTARY, PROSPECTIVE GUIDELINES;
ADDITIONAL FCC REGULATIONS WOULD BE COUNTERPRODUCTIVE**

The Commission seeks comment on how it should work in conjunction with the Access Board to develop equipment guidelines. It asks whether it should: (1) provide a record to the Access Board and comment on the Board's guidelines; (2) adopt the Board's guidelines as binding FCC rules; or (3) adopt FCC rules in addition to the Board's guidelines.²⁸ CEMA urges the Commission *not* to adopt its own regulations but to limit its role to providing the Access Board with guidance. There is no specific rulemaking authority granted to the Commission in Section 255. While the Commission, of course, retains general rulemaking authority under Section 4(i) of the Communications Act, it is clear that Section 255 contemplates a guideline approach to be developed by the Access Board in conjunction with the Commission.²⁹ The Access Board's guidelines should be *voluntary* in nature and take a procedural (*e.g.*, consultation with representatives of the disabled during the design process), not prescriptive (*e.g.*, technical standards), approach. Furthermore, such guidelines should be prospective in nature; *i.e.*, no retrofitting of existing product should be required.³⁰

²⁸ Notice at ¶ 35.

²⁹ The final statutory language of Section 255 omitted language contained in the Senate bill that would have required the Commission to develop regulations. See Notice at ¶ 29.

³⁰ The legislative history of Section 255 clearly indicates that any equipment guidelines should be prospective only. See S. Rep. No. 23, 104th Cong., 1st Sess., at 53 (1995)

Manufacturers which follow such voluntary, procedural guidelines should be entitled to a "safe harbor" defense against all enforcement actions involving alleged Section 255 violations.

FCC guidelines *in addition* to the Access Board's guidelines would be unnecessary and potentially confusing. Manufacturers might first look to the Access Board's guidelines, then consult the Commission's guidelines and conceivably not know which guidelines to follow. Furthermore, the Access Board is better positioned to adopt guidelines because of the existence of the Telecommunications Access Advisory Committee composed of representatives from all sectors of the telecommunications industry. The Advisory Committee can render expert advice about customer wants and needs, as well as which equipment modifications are "readily achievable."

Although it should rely on the Access Board to develop guidelines, the Commission should not adopt the Access Board's guidelines as mandatory rules. Guidelines are meant to provide *general* direction towards the goal of accessibility, but should at the same time permit manufacturers to determine the *specific* path to reach this goal. To require inflexible, government-developed technical standards would lock manufacturers into specific technologies that may soon become obsolete and deprive consumers of a technologically superior, more cost-effective approaches. It is in the economic interest of equipment manufacturers to increase product accessibility because such accessibility increases the customer base for their products.³¹

("The Committee intends this [section 255] requirement to apply prospectively to such new equipment manufactured after the date for promulgation of regulations by the Commission.").

³¹ For example, individuals over the age of 65 are the most likely to have some form of functional limitation and they have the greatest amount of disposable income for consumer products. *See Design for Everyone* (L. Scadden ed. 1994) (a series of articles

Accessible design also benefits individuals *without* disabilities because it can make products generally more convenient.³² Equipment manufacturers, therefore, *already* have an economic incentive to meet the demand for accessible equipment and to provide persons with disabilities with a wide variety of alternative products at affordable prices.

The consumer electronics industry is in the process of drafting industry-wide voluntary guidelines for the development of accessible equipment. For example, CEMA and the Electronic Industries Foundation have established a "Joint Committee on Product Accessibility" and are working in conjunction with Monterey Technologies of Cary, North Carolina to explore ways for manufacturers to incorporate accessible features into the equipment design process. This effort is based on the notion that improving overall accessibility of products is, when "readily achievable," *much less expensive* if done at the initial design stage, rather than added on at a later date to an existing product.³³

reprinted from "CE Network News," The Electronic Industries Association's news monthly on consumer electronics).

³² Curb cuts and volume controls on public payphones are examples of design features originally intended for the disabled but frequently used by the general public. People with normal hearing like to have the option of increasing the volume to combat a noisy environment. Similarly, people with normal vision like to have the option of increasing the brightness or contrast of a display to combat sunny conditions (*e.g.*, at ATM machines).

³³ Because these voluntary guidelines are still in draft form and are currently under review, they are not yet available for consideration. Once these industry-developed guidelines are finalized, however, the Joint Committee on Product Accessibility will present them to the Access Board's Telecommunications Access Advisory Committee for its consideration.

VI. COMMISSION ENFORCEMENT OF SECTION 255 VIOLATIONS BY EQUIPMENT MANUFACTURERS SHOULD BE LIMITED TO DECLARATORY RULINGS

The Commission seeks comment on the extent of its power to enforce compliance with Section 255 requirements.³⁴ The final statutory language of Section 255 makes no reference to any new enforcement or complaint authority under Section 255. Indeed, the Conference Report states that "[t]he remedies available under the Communications Act, *including the provisions of sections 207 and 208*, are available to enforce compliance with the provisions of section 255."³⁵ This statement suggests that only *existing* remedies under the Communications Act are available for enforcement. Sections 207 and 208 of the Communications Act apply only to complaints filed against *common carriers*; the Commission is limited to issuing declaratory rulings and cease-and-desist orders against equipment manufacturers and other non-common carriers. The Commission's enforcement powers against non-common carriers are governed by Section 4(i) of the Communications Act, which contains no provision for private complaints or assessing damages:

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.³⁶

The Commission's statement that Congress must have intended to create a new complaint authority under Section 255 is wholly unsupported and conclusory. In fact, Section

³⁴ See Notice at ¶ 36.

³⁵ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., at 135 (1996) (emphasis added).

³⁶ 47 U.S.C. § 154(i). The Commission's declaratory rulings and cease-and-desist orders issued pursuant to Section 4(i) may be enforced by the courts through Section 401 of the Communications Act. See 47 U.S.C. § 401.

255(f) *expressly prohibits* the creation of any new private rights of action: "Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder."³⁷ Private complaints against non-common carriers were not authorized under the Communications Act prior to the adoption of Section 255 and, pursuant to Section 255(f), are expressly not authorized now. The Commission's existing declaratory ruling power under Section 4(i) is sufficient to enforce Section 255 against non-common carriers and its formal complaint process under Sections 207 and 208 is sufficient to enforce Section 255 against common carriers.

In cases where several different companies are involved in the manufacture of a single piece of equipment, any Commission action regarding an alleged violation of Section 255 should apply only to those companies responsible for the violation. For example, if the Commission determines that the number keypad of an answering machine manufactured by Company A is not accessible, but makes no adverse determinations concerning the answering machine's electronics (manufactured by Company B) or control switches (manufactured by Company C), only Company A should be subjected to a cease-and-desist order or other injunctive relief. Companies B and C should be allowed to continue manufacturing their components without interference. If the keypads in question has already been delivered to the assembler and/or distributor of the answering machine, any Commission injunction should *not* apply to such assembler or distributor; the assembler or distributor should be free to sell the answering machines in inventory without penalty. For the Commission to extend the injunction

³⁷ 47 U.S.C. § 255(f).

to the assembler and distributor would punish innocent parties and cause them significant financial loss by rendering their inventories worthless.³⁸

VII. CONCLUSION

CEMA supports the public policy goals behind Section 255. In order to ensure that accessible telecommunications equipment and CPE are widely available and affordably-priced, CEMA urges the Commission to conclude the following:

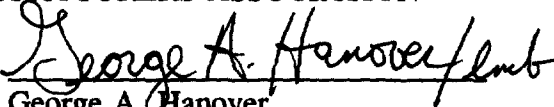
- (1) The Access Board's formulation of voluntary guidelines is sufficient to promote accessible CPE. Additional FCC guidelines would be both unnecessary and potentially confusing;
- (2) The Access Board's guidelines should be voluntary in nature and take a procedural (*e.g.*, consultations during the design process with organizations for the disabled), not prescriptive (*e.g.*, technical standards), approach. Following such guidelines should provide manufacturers with a "safe harbor" defense against all customer complaints;
- (3) Equipment manufacturers should *not* be required to make each and every individual CPE product accessible to people with every disability. This would be technically impossible in many cases, and generally cause manufacturing inefficiencies that would unnecessarily raise prices for the general public. Equipment manufacturers should be afforded the flexibility to provide accessible equipment in the most cost-effective manner, whether by integrating such features into mass-market equipment or producing specialized equipment specifically designed for persons with disabilities.
- (4) The scope of Section 255 is limited to equipment used *primarily* for telecommunications services; equipment that is used only tangentially in combination with telecommunications services should *not* be made subject to the requirements of Section 255;


³⁸ Service providers should work with equipment manufacturers to promote accessibility and failure of service providers to cooperate should be a defense available to manufacturers in any complaint process.

- (5) The definition of "readily achievable" should take into account the cost of modifying CPE, as well as a manufacturer's financial resources. Prior to initial compliance, and once a manufacturer has complied with the then-current accessible guidelines for a piece of equipment, the manufacturer should be afforded a grace period equal in length to the production cycle of that equipment before having to retool its assembly line and update to any new or revised guidelines; and
- (6) Any alleged violation of Section 255 by equipment manufacturers is subject only to declaratory rulings or cease-and-desist orders pursuant to Section 4(i) of the Communications Act; Section 208's damage remedy applies only to common carriers. In cases where equipment is manufactured by different companies, an injunction should apply only to the manufacturer responsible for the specific component in violation; assemblers and distributors should be exempt from all accessible requirements and all injunctions.

Respectfully submitted,

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